

648-IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH CAROLINA
 CHARLESTON DIVISION

UNITED STATES FOR THE USE OF)	Case No.: <u>2:23-cv-264-BHH</u>
ATTAWAY CONSTRUCTION &)	
ASSOCIATES, LLC,)	
)	
Plaintiff,)	COMPLAINT FOR RECOVERY
)	UNDER MILLER ACT PAYMENT
v.)	BOND
)	
FIDELITY AND DEPOSIT COMPANY OF)	
MARYLAND, INC. d/b/a Zurich North)	
America,)	
)	
Defendant)	

Plaintiff, Attaway Construction & Associates, LLC (“Attaway”), sues Fidelity and Deposit Company of Maryland, Inc. d/b/a Zurich North America, the bonding company for the project described herein, and for its cause of action states as follows:

PARTIES AND JURISDICTION

1. Plaintiff Attaway is a Georgia limited liability company, organized and existing under the laws of the State of Georgia, with its principal place of business at 3800 Park Lane, Martinez, Georgia 30907. Its sole member is a resident of Georgia.

2. Defendant Fidelity & Deposit Company of Maryland, Inc. d/b/a Zurich North America (“Zurich” and sometimes “Surety”) is a Maryland corporation, organized and existing under the laws of the State of Maryland, with its principal place of business at 600 Red Brook Boulevard, Owings Mills, Maryland 21117. Zurich’s registered agent, CSC-Lawyers Incorporation Service Company, is located at 7 St. Paul Street, Suite 820, Baltimore, Maryland 21202. Zurich is the Surety on the Bond described herein and is subject to venue and jurisdiction in this Court.

3. There is complete diversity of citizenship in this case, and the claim exceeds \$75,000. Therefore this Court has Jurisdiction under 28 U.S.C. § 1332.

4. The contract at issue was performed at Joint Base Charleston in Charleston, South Carolina. Venue, therefore, is proper in the United States District Court for the District of South Carolina, pursuant to 28 U.S.C. § 1391(b)(2), 40 U.S.C. § 3133(b)(3)(B), as well as pursuant to the provisions of the payment bond at issue.

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the provisions of the Miller Act, 40 U.S.C. § 3133(b)(3)(B).

STATEMENT OF FACTS

6. Before February 24, 2021, Sand Point Services, LLC d/b/a TDX Services (“TDX”) contracted with the USACE on the federal project known as Construct Temp Lodging Facilities (the “Project”) at Joint Base Charleston, Charleston, South Carolina, Contract No.: W912HN-10-D-3003 Task Order 0002 (“Prime Contract”).

7. On February 23, 2021, Attaway and TDX entered into a subcontract (the “Subcontract”) in which Attaway agreed to perform wood framing installations for two new temporary lodging facilities for the Project. A true and correct copy of the Subcontract is attached as Exhibit 1.

8. Zurich as surety (“Surety”), provided a payment bond (the “Payment Bond”) in favor of claimants performing work on the Project. A true and correct copy of the Payment Bond is attached hereto as Exhibit 2.

9. Attaway supplied all materials and labor required by its Subcontract to the Project for the benefit of TDX and USACE.

10. Attaway last supplied materials and labor on the Project on or about June 14, 2022. All such materials and labor were furnished in the construction of the Project.

11. TDX has wrongfully failed to pay Attaway amounts due under the Subcontract. Specifically, Attaway is currently owed \$576,243.08, plus interest, for the labor, materials, and services Attaway furnished pursuant to the Subcontract and in the prosecution of the work on the Project.

12. On October 1, 2019, TDX obtained a Miller Act Payment Bond from Zurich in the amount of \$8,995,802.00, as required by the U.S. Department of the Army. In the Payment Bond, Zurich agreed to be bound jointly and severally with TDX to make payment to all persons having a direct contractual relationship with TDX or to any subcontractor of TDX who furnished labor, material or both in the prosecution of the work provided for in the Prime Contract, in the event that TDX failed to make prompt payment to such persons.

13. After failing to receive payment for work performed from TDX, Attaway sent a demand letter on October 3, 2022 to TDX and Zurich for monies owed to it. A true and accurate copy of said letter is attached hereto as Exhibit 3.

14. Over 60 days have passed since the original demand letter of October 3, 2022, without payment from TDX or Zurich.

**COUNT I
(BREACH OF CONTRACT)**

15. Attaway realleges the previous allegations as though fully set forth herein.

16. Attaway performed its obligations under the Subcontract.

17. TDX has wrongfully failed to pay Attaway amounts owed under the Subcontract. Specifically, Attaway is currently owed \$576,243.08, plus interest, for the labor, materials, and services Attaway furnished pursuant to the Subcontract and in prosecution of the work on the Project.

18. TDX has materially breached the Subcontract by failing to pay Attaway for the work it performed at TDX's direction.

19. As a direct and proximate result of TDX's breach, Attaway has been damaged in the amount of \$576,243.08, plus interest, for the labor, materials, and services Attaway furnished pursuant to the Subcontract, as well as the reasonable attorney fees and costs associated with this action.

20. Zurich is liable under its Payment Bond to pay these sums to Attaway.

**COUNT II
(FEDERAL MILLER ACT PAYMENT BOND)**

21. Attaway realleges the previous allegations as though fully set forth herein.
22. Attaway has satisfied all conditions to payment under the Payment Bond.
23. Surety is obligated, pursuant to the Payment Bond, to pay Attaway for all labor, materials, and services Attaway furnished pursuant to the Subcontract and in prosecution of the work on the Project for which TDX has failed to make payment.
24. TDX and Surety's failure to pay Attaway constitutes a violation of the Payment Bond for which Surety is liable to Attaway in the amount of \$576,243.08, plus interest, attorney's fees, and costs.
25. The Payment Bond is statutory in nature and was required by the Miller Act, 40 U.S.C. §§ 3131 and 3133. Attaway, therefore, is entitled to payment from Surety in the amount of \$576,243.08, plus interest and attorney's fees.

**COUNT III
PROMPT PAY ACT**

26. Pursuant to S.C. Code § 29-6-30, Attaway's performance in accordance with the provisions of the Subcontract entitles it to payment from TDX. Attaway notified TDX and Zurich of S.C. Code § 29-6-0 and § 29-6-50 on October 3, 2022 and made demand for payment pursuant to these statutes.
27. The failure by TDX to pay Attaway and comply with S.C. Code § 29-6-30 entitles Attaway to the recovery of attorney's fees and interest pursuant to S.C. Code § 29-6-50.
28. In the alternative, Attaway asserts that, pursuant to other state codes, TDX's failure to pay Attaway entitles Attaway to the recovery of attorney's fees and interest.
29. Zurich is liable under its Payment Bond to pay these sums to Attaway.

PRAYER FOR RELIEF

WHEREFORE, Attaway respectfully requests:

- A. That this Court grant judgment in Attaway's favor and against Surety in the amount of \$576,243.08, plus interest, and Attaway's reasonable attorney's fees and costs incurred in this action;
- B. That this Court grant judgment in Attaway's favor and against Zurich in the amount of the legal fees, court costs, and reasonable expenses incurred by Attaway in pursuing this action, pursuant to the Subcontract and applicable State law; and
- C. That Attaway be awarded such further relief that this court deems appropriate.

Respectfully submitted this 19th day of January, 2023

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